

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

July 15, 2008

CHIEF CLERKS OFFICE

2008 JUL 15 PM 4:02

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Les Trobman, General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

**Re: SOAH Docket No. 582-08-0163; TCEQ Docket No. 2007-0452-MSW-E; In
Re: In the Matter of an Enforcement Action Against Chester Hermes**

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision on Remand and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **August 4, 2008**. Any replies to exceptions or briefs must be filed in the same manner no later than **August 14, 2008**.

This matter has been designated **TCEQ Docket No. 2007-0452-MSW-E; SOAH Docket No. 582-08-0163**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and eleven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "William G. Newchurch".

William G. Newchurch
Administrative Law Judge

WGN/nl
Enclosures
cc: Mailing List

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: CHESTER HERMES

SOAH DOCKET NUMBER: 582-08-0163

REFERRING AGENCY CASE: 2007-0452-MSW-E

STATE OFFICE OF ADMINISTRATIVE
HEARINGS

ADMINISTRATIVE LAW JUDGE
ALJ WILLIAM G. NEWCHURCH

REPRESENTATIVE / ADDRESS

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CHESTER HERMES

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-08-0163
TCEQ DOCKET NO. 2007-0452-MSW-E

IN THE MATTER OF AN
ENFORCEMENT ACTION
AGAINST CHESTER HERMES

§ BEFORE THE STATE OFFICE
§
§ OF
§
§ ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION ON REMAND

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ) alleges that Chester Hermes has violated 30 TEX. ADMIN. CODE (TAC) § 330.15(c) by disposing of municipal solid waste (MSW), mostly used tires but also wooden pallets and brush, at an unauthorized site. He asks the Commission to enter an order assessing an administrative penalty against Mr. Hermes in the amount of \$2,000.00. He also recommends that the Commission order Mr. Hermes to undertake corrective actions necessary to bring his operations into compliance with the Health & Safety Code¹ and the TCEQ's rules.

Mr. Hermes' property lies off Cooksey Road, south of U.S. Hwy 87 South,² in Bexar County, Texas. The legal description is CB 5139E Block 1, Lot 1 (Locklear Estates). Melissa Story is a Commission investigator. She investigated Mr. Hermes' property on December 14, 2006, in response to an anonymous complaint. Mr. Hermes consented to and accompanied Ms. Story during the inspection. It is undisputed that there are hundreds of tires, about a dozen pallets, and significant quantities of cut brush on Mr. Hermes' property. Nor is it disputed that Mr. Hermes had much of that material placed there. This material generally lies in the bed of an intermittent tributary of a creek.³

Mr. Hermes denies that the above shows that he has disposed of MSW. He claims that he has used the tires to successfully control erosion of his property along the tributary. He contends

¹ Tex. Health & Safety Code Ann. (Vernon 2007).

² ED Ex. 8, p. 000117.

³ ED Exs. 5 and 6.

that the pallets were placed on the property to make it easier to roll the tires into the creek. Even if the tires are MSW, Mr. Hermes contends that some of them were put there by the previous owner of the land and that he cannot be held responsible for those tires. Furthermore, he claims that he does not have sufficient financial resources to pay the proposed penalty or take the proposed corrective actions. Mr. Hermes asks the Commission to deny the ED's Preliminary Report and Petition (Petition) and not assess a penalty or order corrective action.

As set out below, the Administrative Law Judge (ALJ) finds that Mr. Hermes committed the alleged violation and recommends that the Commission assess the penalty and order the corrective action proposed by the ED.

II. JURISDICTION

Mr. Hermes does not dispute the Commission's jurisdiction. The attached proposed order contains the required findings of fact and conclusions of law regarding jurisdiction.

III. PROCEDURAL HISTORY

On October 11, 2007, a preliminary hearing was held in this case, and Mr. Hermes and the ED appeared. They agreed that the hearing on the merits of the case should be held on February 15, 2008. On October 12, 2007, the ALJ issued Order No. 1, setting the hearing on the merits of the case for the time, date, and place agreed to by the parties. That order was mailed to Mr. Hermes at his verified last address of record.

On February 15, 2008, the ALJ convened the hearing on the merits as indicated in Order No. 1. The ED appeared, but Mr. Hermes did not, nor had he asked for a continuance. Based on Mr. Hermes's failure to appear at the hearing, the ED moved for a default judgment. The ALJ granted the motion and on March 4, 2008, issued a PFD recommending that the Commission issue a default order against Mr. Hermes.

On March 17, 2008, Mr. Hermes filed a letter with the ALJ asking for a new hearing. Mr. Hermes stated that he was sick on the day of the hearing and that he was not notified of the hearing date. In a letter on March 24, 2008, the ALJ referred that request to the Commissioners. On March 25, 2008, the Commission's General Counsel, exercising his authority under the Commission's rules, remanded the case to the ALJ for a new hearing.

After the required notice was given to all parties, the hearing on remand was held on June 24, 2008. Mr. Hermes appeared and represented himself. The ED appeared, through Barham A. Richard, staff attorney.

IV. APPLICABLE LAW

In this case, the ED alleges that Mr. Hermes violated only one legal provision, 30 TEX. ADMIN. CODE (TAC) § 330.15(c), which states:

Except as otherwise authorized by this chapter, a person may not cause, suffer, allow, or permit the dumping or disposal of MSW without the written authorization of the commission.

To show that Mr. Hermes violated that rule, the ED must show that at least some of the tires, pallets, or brush on Mr. Hermes' property is MSW. Most of the dispute is about the tires. From the photographs offered as evidence, it appears that the quantities of pallets and brush are sufficiently small that they could be relatively easily removed and disposed at an authorized MSW facility.

Several provisions of the Solid Waste Disposal Act⁴ and rules of the Commission refer to used tires as "waste" under certain circumstances⁵ and refer to "disposal" of used tires,⁶ which

⁴ Health & Safety Code, Chapter 361.

⁵ See Health & Safety Code § 361.112(f) and 30 TAC §§ 60.2 (d)(2)(B)(iv), and 305.70(j)(7).

⁶ See Health & Safety Code § 361.112(d) and 30 TAC § 328.54(b) and (c).

indicates that used tires are considered waste sometimes, but not always. 30 TAC § 328.52(b) concerns the management of used or scrap tires⁷ and indicates that used tires may fall into at least four legal classes:

This subchapter applies to persons that are involved in the generation, transportation, processing, storage, utilization, and disposal of used or scrap tires or tire pieces that are classified as **municipal solid waste, recyclable materials, or inert fill materials**. This subchapter does not apply to whole used or scrap tires that are classified as **industrial solid waste**. (Emphasis added.)

John Forehand is a geologist and the Commission's Scrap Tire Liaison. He acknowledged, as does the ED, that used tires are not necessarily MSW. However, in Mr. Forehand's opinion, the tires on Mr. Hermes' property are MSW.

But opinion alone, no matter how expert, would not be sufficient to determine if Mr. Hermes' tires are MSW. Instead, the evidence must show the tires, pallets, and brush fall within the definition of MSW. For purposes of 30 TAC chapter 330, section 330.3(88) defines "Municipal solid waste" as:

Solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste. (Emphasis added.)

Further, 30 TAC § 330.3 (145) defines "Solid waste" as:

Garbage, rubbish, refuse . . . and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. . . .

⁷ 30 TAC, Chapter 328, Subchapter F.

It is sufficiently clear that many of the tires on Mr. Hermes' property resulted from a commercial operation. Mr. Hermes testified that he obtained them from a tire dealer who was planning to take them to a landfill for disposal. During the hearing, he testified that he had two or three truckloads of tires delivered to his property; but during the investigation, he told Ms. Story that 12 truckloads had been delivered.⁸ As to the other components of the definition of solid waste, the tires are not garbage, which is putrescible, meaning capable of decaying, rotting, or becoming putrid.⁹ It is not clear that they are refuse or rubbish, which are synonymous.¹⁰ Rubbish is defined as:

Nonputrescible solid waste (excluding ashes), **consisting** of both combustible and noncombustible **waste materials**. Combustible rubbish includes paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, brush, or similar materials; noncombustible rubbish includes glass, crockery, tin cans, aluminum cans, and similar materials that will not burn at ordinary incinerator temperatures (1,600 degrees Fahrenheit to 1,800 degrees Fahrenheit).¹¹

That definition is circular and does not allow one to determine if something is solid waste. According to the definition, something is a rubbish, or refuse, if it is a solid waste consisting of waste materials. In other words, rubbish is waste if it is waste.

That leaves the more general category of solid waste: "other discarded material." Thus, the key to determining whether Mr. Hermes's tires are solid waste, hence MSW, is determining whether the tires have been discarded. For purposes of the Commission's chapter 330 rules, to "discard" is:

To abandon a material and not use, re-use, reclaim, or recycle it. A material is abandoned by being disposed of; burned or incinerated (except where the material is being burned as a fuel for the purpose of recovering usable energy); or

⁸ ED Ex. 5, p. 000083.

⁹ 30 TAC § 330.3 (56), "putrescible." Merriam-Webster Online Dictionary. 2008. Merriam-Webster Online. 2 July 2008 <<http://www.merriam-webster.com/dictionary/putrescible>>.

¹⁰ 30 TAC § 330.3 (124).

¹¹ 30 TAC § 330.3 (130)

physically, chemically, or biologically treated (other than burned or incinerated) in lieu of or prior to being disposed.¹²

There is no evidence or argument that the tires, pallets, or brush on Mr. Hermes' property have been burned, incinerated, or treated in lieu of or before disposal. Nor is there evidence that they have been recycled, which involves re-using used material in the production of new products.¹³ But the tires, pallets, and brush would still be abandoned—hence discarded and solid waste—if they were not being used, re-used, or reclaimed.

V. ARE THE TIRES, PALLETS, AND BRUSH BEING USED, RE-USED, OR RECLAIMED?

Mr. Hermes testified, without contradiction, that he had been losing several feet of property per year along the tributary due to erosion. The photos in evidence show the tributary has steep banks, which tends to confirm that Mr. Hermes' land is eroding into the tributary.¹⁴ Mr. Hermes explained that he had been looking for a way to control the erosion or refill the eroded areas on his property for some time, but other alternatives were too expensive. He once arranged to accept "free dirt" to stop the erosion, but it was never delivered. He maintained that the erosion on his land has stopped since the tires were placed there.

According to Mr. Hermes, he obtained two or three trailer loads of tires in 2006 from a friend who owned a tire shop and was planning to dispose of them at a nearby permitted MSW facility. The tire shop delivered them to his property and stacked many of them in an orderly manner across the bed of the tributary.¹⁵ Some were stacked in area outside the bed where active erosion was occurring.¹⁶ However, many tires, several pallets, and large quantities of brush

¹² 30 TAC § 330.3 (38).

¹³ 30 TAC § 330.3 (123).

¹⁴ ED Ex. 6.

¹⁵ ED Ex. 6, p. 000109.

¹⁶ ED Ex. 6, p. 000112.

appear to have been irregularly rolled or thrown into the bed.¹⁷ Mr. Hermes also acknowledged that he had cut brush and placed it among the tires.

Mr. Hermes testified that some of the tires were on his property when he bought it in 1994 or 1995 and had been placed there by a previous owner, who has died. But Mr. Hermes never specified or even approximated the location or number of tires that he alleged was placed there by the previous owner. Nor did he offer other evidence to support his claim that some of the tires had been placed there before he bought the property. The ALJ concludes that the evidence is insufficient to conclude that any significant quantity of tires was on Mr. Hermes' property when he purchased it. Moreover, if the tires that Mr. Hermes admits placing there were waste, he committed the alleged violation, whether or not he was responsible for placing all of the tires on his property.

Mr. Hermes also testified that he still uses some of the tires as spares to replace tires on his farm equipment. He stated that he recently used three of them for that purpose. However, he offered no evidence to show that a significant number of tires would ever be re-used as spares.

To the extent that Mr. Hermes was attempting to control erosion of his land, Mr. Forehand noted that the Commission has adopted 30 TAC § 328.66, concerning land reclamation projects using tires. Mr. Forehand testified that Mr. Hermes' erosion control efforts, if that is what they are, do not comply with all of the requirements of that rule, including but not limited to: prior notification of the ED; splitting, quartering, or shredding the tires; and mixing the tires with not less than 50 percent inert material. According to Mr. Forehand, lack of compliance with the land reclamation rule shows that Mr. Hermes was not using the tires to controlling erosion but simply discarding them.

The ED has not alleged in his petition that Mr. Hermes has violated 30 TAC § 328.66, so the Commission need not determine whether he did. Nor can the ALJ agree that non-compliance

¹⁷ ED Ex. 6, pp. 000110, 000111, 000113, and 000114.

with some provisions of that rule necessarily indicates that no tire re-use was occurring and that the tires had merely been discarded. Sloppy and inefficient re-use of tires might still be authentic re-use.

The ED contends that Mr. Hermes' use of the tire, pallets, and brush must be beneficial to avoid a conclusion that those materials were discarded on Mr. Hermes' property. The Commission has published "Guidelines for Projects Involving the Beneficial Use of Used or Scrap Tires."¹⁸ But they do not clearly indicate which re-uses of tires are beneficial and which are not. Nor do the guidelines or any rule or statute purport to require consideration of the factors set out in the guidelines. Instead, the guidelines merely suggest factors that a potential tire re-user should consider in determining whether the use is beneficial, including whether the re-use results in a benefit other than disposal, creates offsetting problems or risks, or violates laws. The guidelines specifically leave it to the person considering a re-use of tires to determine if the project is beneficial. The ALJ concludes that the guidelines are too vague, conditional, and non-mandatory to assist in determining whether the tires on Mr. Hermes' property were MSW.

Moreover, the definitions of MSW, solid waste, and discard in the Commission's rules do not refer to beneficial use. If beneficial were used to mean genuine re-use rather than a pretense, the ALJ would agree that the use must be beneficial.

Mr. Hermes testified that he was aware of the Commission's beneficial-use guidelines and considered them. He concluded the tires would minimize erosion of his property, discovered that tires were often used for that purpose elsewhere as recommended by the Soil and Water Conservation Board, could see no significant risk to others since he was using the tires in an isolated location, and could find nothing to specifically indicate that he was breaking the law. Based on that, he claims that he has always thought, and still thinks, that his use of the tires was beneficial and that he has not discarded the tires on his property.

¹⁸ ED Ex. 11.

The evidence is sufficient to conclude that Mr. Hermes is using some of the tires to control erosion of his land and that they are accomplishing that purpose to some extent. There is no evidence contradicting Mr. Hermes' testimony that erosion of his property has stopped since he had the truckloads of tires placed there. A series of photographs show some tires stacked across the creek bed in reasonably good order.¹⁹ If Mr. Hermes were using all of the tires in that manner, the ALJ might agree that Mr. Hermes had not discarded the tires. That would mean that the tires were not solid waste or MSW and Mr. Hermes had not committed the alleged violation.

The problem is that at least dozens, and likely hundreds, of other tires on Mr. Hermes' property have been haphazardly rolled into the creek and are intermingled with pallets and brush.²⁰ It is not impossible that this jumbled mix of material might control land erosion to some extent, but the ALJ cannot find that it would. Instead, the greater weight of the evidence is that many of the tires, many pallets, and the brush have been abandoned and are not being re-used, reclaimed, or recycled. Based on that, the ALJ concludes that material is solid waste and MSW and that Mr. Hermes violated 30 TEX. ADMIN. CODE (TAC) § 330.15(c) by causing, suffering, allowing, or permitting the dumping or disposal of MSW without the written authorization of the commission.

VI. PENALTY

Cynthia McKaughan is an enforcement coordinator for the Commission. She testified that she calculated the propose \$2,000 penalty in accordance with the Commission's September 1, 2002, penalty policy. She testified that the violation is minor actual (because there is a relatively small amount of waste in the tributary), the source is minor (due to the small amount of waste brought to the site), and two quarterly violations had occurred (from December 14, 2006, when the site was investigated, until June 12, 2007, when the case was screened by the

¹⁹ ED Ex. 6, pp. 000108, 000109, and 000112.

²⁰ ED Ex. 6, pp. 000110, 000111, 000113, and 000114.

staff). That yielded a \$2,000 base penalty, \$1,000 per quarter. She testified that no upward or downward adjustment was indicated by the facts or the penalty policy.

Mr. Hermes did not argue that the proposed penalty was calculated incorrectly. He did argue that he should not be assessed a penalty because he did not have the resources to pay it. However, his claim of inability to pay was conclusory and not supported by any documentation.

The ALJ concludes that Mr. Hermes should be assessed a \$2,000 penalty for his violation of 30 TAC § 330.15(c).

VII. CORRECTIVE ACTION

The ED proposes that the Commission order Mr. Hermes to take action to correct his violation. He would be required to immediately cease accepting waste, remove all waste (including tires, pallets, and brush) from his property and properly dispose of it at an authorized facility within 30 days of the issuance of the order, and submit written certification and supporting documentation to demonstrate his compliance with the order within 45 days.

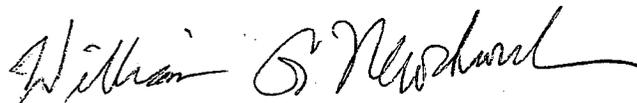
As with the penalty, Mr. Hermes argued that he lacked resources to take the corrective action, but offered no evidence to support that contention. He also argued that many of the tires were there when he acquired the property, but as discussed above, the ALJ cannot conclude that is true.

The ALJ recommends that the Commission order Mr. Hermes to take the corrective action proposed by the ED. Although some of the tires may be preventing erosion, it is not clear which ones fall into that category. The ALJ does not recommend that the Commission attempt to distinguish them and exempt them from the ordered removal. If Mr. Hermes leaves any used tires on his property, he may leave himself open to future penalties for not complying with 30 TAC § 328.66, regarding land reclamation projects using tires.

VIII. SUMMARY

The ALJ recommends that the Commission adopt the attached proposed order, finding that Mr. Hermes committed the alleged violation and ordering him to pay the penalty and take the corrective actions recommended by the ED.

SIGNED July 15, 2008.



WILLIAM G. NEWCHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER

**Assessing Administrative Penalties Against and Requiring Corrective Actions By
CHESTER HERMES
SOAH DOCKET NO. 582-08-0163
TCEQ DOCKET NO. 2007-0452-MSW-E**

On _____, the Texas Commission on Environmental Quality (TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective actions of Chester Hermes (Mr. Hermes). A Proposal for Decision (PFD) was presented by William G. Newchurch, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing in this case on June 24, 2008, in Austin, Texas.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Mr. Hermes owns property near Cooksey Road, south of U.S. Hwy 87 South, in Bexar County, Texas. The legal description is CB 5139E Block 1, Lot 1 (Locklear Estates).
2. A Commission investigator inspected Mr. Hermes' property on December 14, 2006, in response to an anonymous complaint. Mr. Hermes consented to and accompanied the investigator during the inspection.

3. On December 14, 2006, there were hundreds of tires, about a dozen pallets, and significant quantities of cut brush on Mr. Hermes' property, mostly in an intermittent tributary. The total volume was less than 150 cubic yards.
4. Mr. Hermes obtained several trailer loads of tires in 2006 from a tire dealer who was planning to dispose of them at a nearby permitted MSW facility.
5. The tire shop delivered the tires to Mr. Hermes' property and stacked some of them in an orderly manner across the bed of a tributary running through the property. Some were also stacked in an area outside the bed where active erosion was occurring.
6. However, many of the tires on Mr. Hermes' property have been haphazardly rolled into the creek, are intermingled with pallets and brush, and are not being used to control erosion or in any other productive way.
7. Based on the above Findings of Fact, many of the tires, many pallets, and the brush have been abandoned and are not being re-used, reclaimed, or recycled.
8. On March 16, 2007, Mr. Hermes received notice from the ED alleging that the placement of the tires, pallets, and brush on his property violated 30 TEX. ADMIN. CODE (TAC) § 330.15(c).
9. On July 13, 2007, the ED filed his EDPRP and mailed a copy to Mr. Hermes at his last address of record with the Commission: 10598 US Highway 87 S., Adkins, TX 78101.
10. In the EDPRP, the ED alleged the above facts, alleged that they showed that Mr. Hermes had violated 30 TAC § 330.15(c), and proposed that the Commission levy a \$2,000 penalty for that violation and order Mr. Hermes to take the corrective actions detailed below in this Order.

11. In the EDPRP, the ED also alleged that Mr. Hermes had committed an actual-release, minor-harm violation and proposed two penalty events for the 180-day period from the date of the investigation until June 12, 2007, and a \$1,000 penalty for each event. The ED proposed no penalty adjustments.
12. The EDPRP also indicated that Mr. Hermes was entitled to a hearing on the alleged violation and proposed penalty and corrective actions if he requested one.
13. On July 31, 2007, Mr. Hermes filed an answer to the EDPRP requesting a hearing on the alleged violation and proposed penalty and corrective actions.
14. On September 4, 2007, the ED asked the Commission's Chief Clerk to refer this case to SOAH for hearing.
15. On September 13, 2007, the Chief Clerk referred this case to SOAH for hearing.
16. On September 21, 2007, the Chief Clerk mailed notice of the scheduled preliminary hearing to Mr. Hermes at his last address of record: 10598 US Highway 87 S., Adkins, TX 78101. The notice of hearing:
 - a. Indicated the time, date, place, and nature of the hearing;
 - b. Stated the legal authority and jurisdiction for the hearing;
 - c. Indicated the statutes and rules the ED alleged the Respondent violated;
 - d. Referred to the EDPRP, a copy of which was attached, which indicated the matters asserted by the ED;
 - e. Advised the Respondent, in at least 12-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by legal representative would result in the factual allegations contained in the notice and EDPRP being deemed as true and the relief sought in the notice possibly being granted by default; and
 - f. Included a copy of the ED's penalty calculation worksheet, which showed how the penalty was calculated for the alleged violations.
17. On October 11, 2007, ALJ Newchurch held a preliminary hearing as indicated in the notice and Mr. Hermes and the ED appeared.

18. At the preliminary hearing, Mr. Hermes verified that his address was 10598 US Highway 87 S., Adkins, TX 78101.
19. At the preliminary hearing, the parties agreed that the hearing on the merits of the EDPRP should begin at 9:00 a.m., February 15, 2008, at the William P. Clements Office Building, Fourth Floor, 300 West 15th Street, Austin, Texas.
20. On October 12, 2007, the ALJ issued Order No. 1, setting the hearing on the merit for the time, date, and place agreed to by the parties.
21. A copy of Order No. 1 was mailed to Mr. Hermes at his verified last address of record.
22. On February 15, 2008, the ALJ convened the hearing on the merits as indicated in Order No. 1.
23. The ED appeared at the hearing on February 15, 2008, through his attorney, Barham A. Richard, but Mr. Hermes did not appear and did not seek a continuance of that hearing.
24. Based on Mr. Hermes's failure to appear at the hearing, the ED moved for a default judgment. The ALJ granted the motion and on March 4, 2008, issued a PFD recommending that the Commission issue a default order against Mr. Hermes.
25. On March 17, 2008, Mr. Hermes filed a letter with the ALJ asking for a new hearing. Mr. Hermes stated that he was sick on the day of the hearing and that he was not notified of the hearing date. In a letter on March 24, 2008, the ALJ referred that request to the Commissioners. On March 25, 2008, the Commission's General Counsel, exercising his authority under the Commission's rules, remanded the case to the ALJ for a new hearing.

26. After the required notice was given to all parties, the hearing on remand was held on June 24, 2008. Mr. Hermes appeared and represented himself. The ED appeared, through Barham A. Richard, staff attorney.

CONCLUSIONS OF LAW

1. Under TEX. WATER CODE ANN. § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the TEX. WATER CODE ANN. (Water Code) or the TEX. HEALTH & SAFETY CODE ANN. (Health & Safety Code) within the Commission's jurisdiction, or of any rule, order, or permit adopted or issued thereunder.
2. Under Water Code § 7.052, a penalty may not exceed \$10,000 per violation, per day, for each violation at issue in this case.
3. As required by Water Code § 7.055 and 30 TAC §§ 1.11, 1.12, 70.104, and 80.6(b)(3), Mr. Hermes was notified of the EDPRP and of the opportunity to request a hearing on the violations alleged and the penalties and corrective actions proposed therein.
4. As required by TEX. GOV'T CODE ANN. (Gov't Code) § 2001.052; Water Code § 7.058; 1 TAC § 155.27; and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Mr. Hermes was properly notified of the hearing.
5. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to Gov't Code ch. 2003.
6. 30 TEX. ADMIN. CODE (TAC) § 330.15(c) states:
Except as otherwise authorized by this chapter, a person may not cause, suffer, allow, or permit the dumping or disposal of MSW without the written authorization of the commission.

7. For purposes of chapter 330 of 30 TAC, section 330.3(88) defines "Municipal solid waste" as:

Solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste.

8. 30 TAC § 330.3 (145) defines "Solid waste", as:

Garbage, rubbish, refuse . . . and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. . . .

9. For purposes of the Commission's chapter 330 rules, 30 TAC § 330.3 (38) defines "discard" as:

To abandon a material and not use, re-use, reclaim, or recycle it. A material is abandoned by being disposed of; burned or incinerated (except where the material is being burned as a fuel for the purpose of recovering usable energy); or physically, chemically, or biologically treated (other than burned or incinerated) in lieu of or prior to being disposed.

10. Based on the above Findings of Fact, many of the tires, the brush, and the pallets on Mr. Hermes' property have been discarded and are solid waste and MSW.

11. Based on the above Findings of Fact and Conclusions of Law, Chester Hermes violated 30 TAC §330.15(c), by disposing of municipal solid waste at an unauthorized site.

12. In determining the amount of an administrative penalty, Water Code § 7.053 requires the Commission to consider several factors including:

- a. Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;
- b. The nature, circumstances, extent, duration, and gravity of the prohibited act;
- c. The history and extent of previous violations by the violator;
- d. The violator's degree of culpability, good faith, and economic benefit gained through the violation;
- e. The amount necessary to deter future violations; and

- f. Any other matters that justice may require.
13. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
 14. Based on the above Findings of Fact, the factors set out in Water Code § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalty, and a total administrative penalty of \$2,000 is justified and should be assessed against Mr. Hermes for the violation of 30 TAC §330.15(c).
 15. Based on the above Findings of Fact and Conclusions of Law, Mr. Hermes should be assessed a \$2,000 penalty for his violation of 30 TAC § 330.15(c).
 16. Based on the above Findings of Fact, the Respondent should be required to take the corrective actions recommended by the ED in the EDPRP.

ORDERING PROVISIONS

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Within 30 days after the effective date of this Order, Mr. Hermes shall pay an administrative penalty in the amount of \$2,000 for his violation of 30 TAC §330.15(c) with the notation "CHESTER HERMES, RN105224695, TCEQ DOCKET NO. 2007-0452-MSW-E" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088.

2. Immediately upon the effective date of the Commission Order, Mr. Hermes shall cease disposing of any additional waste at the Site.
3. Within 30 days after the effective date of the Commission Order, Mr. Hermes shall ensure that all unauthorized waste, including all tires, at the Site is removed and properly disposed of at an authorized facility.
4. Within 45 days after the effective date of the Commission Order, Mr. Hermes shall submit written certification and detailed supporting documentation, including photographs, receipts, and/or other records, to demonstrate compliance with this order. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

5. Mr. Hermes shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

with a copy to:

Henry Karnei, Jr., Waste Section Manager
Texas Commission on Environmental Quality
San Antonio Regional Office
14250 Judson Rd.
San Antonio, TX 78233-4480

6. The payment of the administrative penalty and compliance with all the terms and conditions set forth in this order will completely resolve the violation set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here.
7. The ED may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Mr. Hermes if the ED determines that the Mr. Hermes has not complied with one or more of the terms or conditions in this Order.
8. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
9. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Gov't Code § 2001.144.
10. The Commission's Chief Clerk shall forward a copy of this Order to Mr. Hermes.
11. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**BUDDY GARCIA, CHAIRMAN
FOR THE COMMISSION**